

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FARON L. PRINCE

Claimant

VS.

INDUSTRIAL TRUCK & TRAILER REFINISHING

Respondent

AND

CAROLINA CASUALTY INSURANCE COMPANY

Insurance Carrier

Docket No. 1,051,076

ORDER

Respondent appeals the February 10, 2011, preliminary hearing Order of Administrative Law Judge Steven J. Howard (ALJ). The Order simply states that the court's Order of August 25, 2010, remains in effect. The issues raised at the February 8, 2011, preliminary hearing and the court's determination of those issues are not mentioned. The original Order of August 25, 2010, allowed claimant authorized medical treatment with Dr. Vito J. Carabetta for treatment and, if claimant is at maximum medical improvement (MMI), then a rating. It can be assumed, as the ALJ allowed claimant's entitlement to ongoing medical treatment, that he found in favor of claimant on the contract of hire issue. However, the Order of February 10, 2011, is silent in that regard.

Claimant appeared by his attorney, Joseph Donald Lysaught, Jr., of Shawnee, Kansas. Respondent and its insurance carrier appeared by their attorney, Elizabeth R. Dotson of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held February 8, 2011, with attachments, and the documents filed of record in this matter.

ISSUE

Did the last act necessary to complete claimant's contract of hire occur while claimant was in the state of Kansas? Respondent contends that the last act necessary to

complete the contract for hire occurred in its main office in Kansas City, Missouri, with both claimant and respondent's supervisor, Kale Spidle, present in the office. Claimant contends that he was offered the job while in Missouri, but took the offer of employment home to be discussed with his wife. While at home, claimant received a phone call from respondent with the job offer. Claimant accepted the offer while in Bonner Springs, Kansas. Claimant's location when he accepted the offer of employment is the only issue brought to the ALJ at the preliminary hearing on February 8, 2011.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant originally worked for respondent through a temporary agency. Shortly after claimant started working, respondent determined that, as he was a good worker, respondent was interested in hiring claimant full time. An offer of employment was extended to claimant, and he accepted the offer. Claimant's location at the time of that acceptance is the only issue before the Board.¹

Two witnesses testified at the preliminary hearing. Carey Walsh, respondent's secretary, had been working for respondent for about seven years. She testified that a job offer was made to claimant shortly after he began working through the temporary agency. The offer was made by Mr. Spidle while both claimant and Mr. Spidle were standing in respondent's office in Missouri. Ms. Walsh was also present. The offer was made in September 2009, and claimant accepted the offer on the spot. At that time, Ms. Walsh provided claimant with the appropriate paperwork to facilitate his hire. Claimant then took the paperwork home to complete and return at a later date. A wage statement, marked as respondent's exhibit A to the preliminary hearing, indicated that claimant's hire date was Wednesday, September 30, 2009. The parties requested the opportunity to supplement the record with employment records. The ALJ allowed the request, and exhibits B-G (with exhibit G comprising two pages) were provided to the court. The exhibits show claimant being paid by Labor Ready from Wednesday, September 23, to Friday, September 25, 2009. Claimant's employment application is dated Wednesday, September 30, 2009, and additional tax and employment documents are dated October 1, 2009. Respondent argues that claimant would not have been provided the employment papers to take home if he had not already accepted the offered job.

Claimant testified that he worked for respondent through the temporary agency for a short time before being offered full-time employment. Claimant testified that he was approached by Mr. Spidle on a Friday about full-time employment. Claimant expressed interest in the job, and Mr. Spidle said that he would talk to the company president, the

¹ The date of accident in this case is November 25, 2009.

owner, and “get back with you”.² Claimant then went home and talked to his wife. Then, either that same day or the next day, claimant was called by Mr. Spidle and offered the job. Claimant accepted while on the phone at his home in Bonner Springs, Kansas. Exhibit G to the preliminary hearing is a letter between claimant and Sprint, claimant’s telephone service provider. The second page of exhibit G is a list of phone calls between claimant’s Sprint phone and a number in Missouri, area code 816. This phone call occurred on Tuesday, September 29, 2009. Claimant contends that the phone number is respondent’s. As noted above, claimant filled out the Application For Employment, exhibit C, the next day, September 30, 2009.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant’s burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

When that act is the acceptance of an offer during a telephone conversation, the contract is “made” where the acceptor speaks his or her acceptance.⁶

The contract is “made” when and where the last necessary act for its function is done.⁷ When that last necessary act is the acceptance of an offer during a telephone conversation, the contract is “made” where the acceptor speaks his or her acceptance.⁸

² P.H. Trans. at 16.

³ K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 2009 Supp. 44-501(a).

⁶ *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, 512 P.2d 438 (1973).

⁷ *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975).

⁸ *Morrison, supra*, at Syl. ¶ 1; see Restatement (Second) of Contracts, § 64, Comment c (1974); *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 551 (2000).

The basic principle of law is that a contract is “made” when and where the last act necessary for its formation is done.⁹

It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.¹⁰

Only two witnesses testified in this matter. Their testimonies paint two very different pictures. It is difficult to reconcile the evidence without one or the other being discredited. However, the legislature has given some direction in these situations. The liberal construction rule from K.S.A. 2009 Supp. 44-501(g) creates a judicial obligation on the part of the finders of fact to liberally assess the evidence, with the goal being to bring both employers and employees within the four corners of the Workers Compensation Act (Act). Additionally, the Board has in the past given some deference to the determination of witness credibility by an administrative law judge where there is conflicting testimony.

Here, both witnesses testified at the preliminary hearing. The ALJ apparently found claimant’s description of the events leading to the creation of the employment contract to be the more credible. This Board Member, relying somewhat on that apparent determination, also finds claimant’s description of the events the most persuasive. Claimant’s testimony that he received a telephone call from respondent shortly before beginning his employment is supported by an apparent call from respondent on September 29, 2009, with claimant’s hire date being the very next day on September 30, 2009.

For preliminary purposes, this Board Member finds that the contract of employment in this matter was formed when claimant accepted the job offer while talking with respondent on the phone and while he was in his house in Bonner Springs, Kansas. Therefore, the Kansas Workers Compensation Division (Division) has jurisdiction to determine this matter. Should there be additional evidence on this issue, this Board Member is confident that the parties will present it at the time of the final award.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this

⁹ *Smith, supra.*

¹⁰ K.S.A. 2009 Supp. 44-501(g).

¹¹ K.S.A. 44-534a.

review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving that the contract of employment was finalized while he was in his house in Bonner Springs, Kansas, as claimant accepted respondent's offer of a job. Therefore, jurisdiction in this matter lies in Kansas. The Order of the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Steven J. Howard dated February 10, 2011, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2011.

HONORABLE GARY M. KORTE

c: Joseph Donald Lysaught, Jr., Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge